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No. 94-

In The

Supreme Court of the United States

October 1994 Term

UNITED STATES OF AMERICA,

Respondent,

vs.

TED W. GLEAVE,

Petitioner.

Petition for Writ of Certiorari to the Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Does the client of a lawyer have a legitimate expectation of privacy in the papers held by the lawyer as part of the client's file, and therefore "standing" to challenge a search of the office or the client's files taken therefrom?

2. Knowing that they were stolen from a law office, may a United States Attorney rummage through files of an attorney in search of evidence of criminality without a warrant?

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History

The District Court's opinion in originally denying the motion to suppress evidence is reported at *United States v. Gleave*, 786 F.Supp. 258 (WDNY 1992). The opinion of the Second Circuit, is under the name United States v. Knoll and Gleave, at 16 F.3d 1313, 1994 WL 44128 (2nd Cir.1994) and is reproduced in the appendix.

Jurisdiction

This Circuit Court's order was entered on June 10, 1994, and the Petitioner's Motion for Rehearing was denied on June 3, 1994. Jurisdiction for this Court's review is at least conferred by the provisions of 28 U.S.C. § 1254.

Amendment IV, U.S. Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Facts

In late June, 1986, the law office of David R. Knoll, in Buffalo, New York, was burglarized. Legal files were stolen and materials from those files were used directly or indirectly to obtain the challenged conviction.[251, 296-298][1] The manner in which these files worked their way into the hands of an Assistant United States Attorney is still being explored on the remand of this matter to the district court, at least as to the co-defendant Knoll. It is the "standing" of Ted Gleave, the client of Mr. Knoll, to also challenge the government's role in the burglary and seizure and search of his files, that is primarily at issue on this Petition.

A. Burglary

The burglary plot was hatched in the criminal mind of Daniel Nowak, a jail inmate at the Erie County Holding Center. A former employee of Knoll, Nowak talked with Timothy Ernle about the possibility of providing incriminating evidence against Mr. Knoll, the subject of an FBI investigation, in exchange for favorable treatment on Mr. Ernle's pending charges. [205-217] Nowak had already been used by the FBI as an informant against Mr. Knoll prior to the burglary. [185-192] Ernle solicited Albert Hintenberger to break into Knoll's office and steal material. After the break-in was accomplished, Ernle contacted Assistant

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[1]Numbers in brackets [ ] refer to pages in the Joint Appendix filed with the Second Circuit.

United States Attorney (AUSA) Anthony Bruce and a delivery of a small portion of the stolen documents and tapes from Knoll's law office was made to AUSA Bruce by Patricia Devany, Ernle's girlfriend.[160-161]

When Mr. Ernle called Assistant United States Attorney Bruce from prison to discuss the delivery, Mr. Bruce testified that he said that the documents that had been provided were "worthless", and that "If there's stuff out there, you've got to turn it over." [160] Later, Mr. Bruce testified again that he told Mr. Ernle that "I said you're going to have to get me more information. He said okay . . . [and that] he would get Trish to do it." [162]

Subsequent to these instructions, Devany either obtained or "went through" additional documents and listened to some tapes. [225-229] In all, several cartons of documents and tapes were ultimately delivered. [161-165] Even so, Ms. Devany never said that she read all of the documents or listened to all of the tapes before providing them to Bruce.

It was in the second delivery that documents were found, linking Knoll and his client Ted W. Gleave to Barclays Bank accounts in the Cayman Islands.[162-163] These documents led the government to bank records used to convict Knoll and Gleave.

B. Background

In the early 1980's, David Knoll was an attorney who was saddled with substantial debt and encumbrances on his assets due to some poor business decisions. [319] He went to the Cayman Islands in 1981 to try to establish a relationship with Barclays Bank so he could further his dealings in

international trade, particularly negotiations for various ventures with the Chinese. [315-316] To accomplish this, Mr. Knoll wanted to form a non-American company called Atlantis International, be its President, its signatory, and own its shares with others. He had investment capital as a result of money he received from one Anthony Korobellis. [302, 312, 370-373]

Unfortunately, however, Mr. Knoll's past business failures and poor credit rating prevented Mr. Knoll from himself obtaining the letter of recommendation from a United States bank that Barclays Bank required. [319-320] Mr. Knoll's banker suggested that he speak with Mr. Gleave, a friend and former client who had helped Mr. Knoll with a loan in the past. [315-316, 320-321] Mr. Gleave was glad to assist after Mr. Knoll told him that he would face no personal exposure. [321] Mr. Gleave obtained the required letter of recommendation from his bank. [321, 502]

Mr. Gleave and Mr. Knoll then went to the Cayman Islands on February 15, 1982. [339-340, 356] Mr. Knoll planned to have Mr. Gleave establish accounts with Barclays Bank in the name of Atlantis International. The legal documents necessary to incorporate Atlantis International, Ltd. were not completed in time, however, so a personal checking account with an opening balance of $9,000 was set up in the name of Ted W. Gleave on at that time.[509] Once the personal account was opened in Mr. Gleave's name, another letter of recommendation was not needed to open a corporate account. [324, 328]

Mr. Knoll left the Barclays Bank personnel with the understanding that Mr. Gleave's name would be taken off the account when the corporate account was substituted. [360]

Thereafter, on March 4, 1982, Atlantis International, Ltd. was incorporated. [454-455] Mr. Gleave had signed the account signature card in blank in February, and the words "Atlantis International" as account-holder were added later at Mr. Knoll's direction. [327, 515] Although Mr. Gleave was President, he held no stock or ownership. [305, 313-314, 331-332, 334] Mr. Gleave was simply the signatory for the Atlantis International bank account, and completed some forms and documents for Barclays Bank so that Mr. Knoll and Atlantis International could benefit from Mr. Gleave's letter of recommendation. Long before his bankruptcy petition in August of 1982, Mr. Gleave resigned as President of Atlantis International, Ltd. [330-331]

Once Atlantis International was incorporated, Mr. Knoll sent various cashier's checks to Barclays Bank in certificates of deposit, and the checking account for Atlantis International. [459-460] Mr. Knoll did not tell Mr. Gleave the amount or source of money. [354] Ultimately, the certificates of deposit totalled $600,000.

Aside from the routine "rolling over" of the certificates of deposits, no other activity took place in connection with them until December, 1984. [482] By April 15, 1986, all certificates of deposit were cashed. [491] Although Mr. Gleave officially remained signatory on the Atlantis International checking account, the small amount of money in this account was managed solely by Mr. Knoll, who would write checks with permission to sign Mr. Gleave's name. Mr. Knoll received all account statements and did not discuss them with Mr. Gleave. [352-353] Mr. Knoll gave the directions to the bank. [303-304] Mr. Knoll thus controlled Atlantis International and its accounts.

Based upon the jury's verdict of acquittal on over forty counts, the jury credited the testimony of Mr. Knoll and Anthony Korobellis that the $600,000 was money given by Mr. Korobellis to Mr. Knoll. Most importantly, the jury necessarily concluded that this was not Mr. Gleave's money, a total rejection of the government's theory at trial. [302-303, 311-312, 325, 361-365, 369-373]

C. Bankruptcy Filing

It was the failure of Gleave to list the accounts related to Atlantis International in his bankruptcy petition that was charged in Count Three, relating to concealment of assets, the sole surviving count of the indictment.

By 1982, Mr. Gleave was in the midst of a divorce action in Indiana, his former residence. By July, 1982, Mr. Knoll knew that the forthcoming matrimonial decision would essentially award all of Mr. Gleave's assets to his estranged wife leaving him unable to satisfy his many creditors. Mr. Knoll recommended that Mr. Gleave file a Chapter 11 bankruptcy petition, [309-310, 341], which was done on August 2, 1982. [519-540].

Indeed it happened later that month that the matrimonial court issued an order by which all of Mr. Gleave's property was either given to his wife or encumbered to pay her. [342-344]

Mr. Gleave reached a settlement with his ex-wife, [347], and Mr. Knoll's advice had protected Mr. Gleave's assets. Now that the threat had passed, Mr. Knoll sought to withdraw Mr. Gleave from bankruptcy. [346] No debt of

Mr. Gleave was discharged, and no creditor lost money.[2] But it was Mr. Gleave's failure in the 1982 bankruptcy petition to mention Atlantis International and the related accounts that led to the concealment of assets conviction which is challenged now.

D. The Prosecution

On February 22, 1990, Mr. Knoll and his client, Mr. Gleave, were indicted on forty-six counts of conspiracy, bankruptcy fraud, money laundering and interstate transportation of stolen property based upon actions beginning in 1982 and largely based upon the supposition that the money in the Atlantis International account actually belonged to Gleave and that Gleave obtained the money illegally. [48-111]

As it turned out, After a three-month trial the jury acquitted each defendant on all but two counts, soundly rejecting the Government's claim that Mr. Gleave and Mr. Knoll sought to hide Mr. Gleave's assets and launder his money. [410-427] As noted by the District Court, Hon. William M. Skretny, the evidence in this case was not strong:

> Let me start out . . . with this statement, and it's a statement of disagreement with [the government's] belief that the evidence is necessarily strong and solid in this

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[2] Ashland Oil, a disputed creditor, asked that the bankruptcy proceeding be transferred to Chapter 7 liquidation. [348] Ashland since settled its claim with Mr. Gleave for $100,000. [376] There is enough money now in the bankruptcy estate to pay this claim, once separate IRS claims are resolved in the Tax Court.

> case. I don't necessarily share that view, and I mentioned that because I think it's important for all of you to know that.[440] Nevertheless, Judge Skretny denied the post-trial motions.

The jury convicted Mr. Gleave on Count Three, involving concealment of assets, and both defendants on Count Four, with respect to alleged false statements in Mr. Gleave's bankruptcy petition.

The jury also convicted Mr. Knoll on Count Eight. [97-98] This Count charged that Knoll aided and abetted Mr. Gleave's failure to disclose Barclay's "savings account" in a 1987 financial statement filed with the government. Gleave was sentenced to a three month period of incarceration and a $5000 fine. The fine has been paid but the incarceration has been stayed by the district court pending determination of this petition.

Each of the surviving charges depended upon the legality of the use of the papers obtained in the law office burglary.

E. Motion to Suppress

The District Court denied the defendants' suppression motion, *United States v. Gleave*, 786 F.Supp. 258 (WDNY 1992). The District Court never addressed the issue of Gleave's standing to challenge the burglary/search of Knoll's office and files therefrom. It merely concluded that the search was a "private" search not implicating the Fourth Amendment.

F. The Second Circuit Ruling

The Circuit Court reversed the Count Four conviction of both defendants, involving the claimed false statements in the 1982 bankruptcy petition, because the prosecution of the false statement charges was time barred.

As to the suppression issues, upon which the remaining charges against Gleave (Count 3) and Knoll (Count 8) depended, the Circuit Court panel recognized that there was "[c]onflicting evidence . . . as to whether Ernle had contacted FBI agents prior to the burglary. The evidence showing earlier contact was discredited by the trial court, which found the government had no prior knowledge of the burglary." Yet, there was evidence that the FBI spoke with Mr. Ernle prior to the burglary [204], and Mr. Ernle testified at the suppression hearing that they specifically discussed Mr. Knoll and the burglary at that time. [212-217] However, an internal FBI memo which corroborated Mr. Ernle's recollection [202-203] was discounted by the district court as being mistaken, see *United States v. Gleave*, 786 F.Supp. at 288, and the Circuit Court "decline[d] to rehash" these findings.

As to the right of the government to review files stolen from a lawyer who happened to be under investigation, the Circuit Court agreed with the District Court that the "private search" doctrine applied. The continuing vitality of this doctrine, at least under circumstances similar to this, is challenged in this Petition.

The final defense argument was that the further searching of the records at Bruce's instruction made the government a party to the "private" search. The inadequacy of the record to explain exactly what happened during the time between the burglary and the delivery of the subject documents

to Bruce resulted in a remand by the Circuit Court. Of concern to the Circuit Court was whether, even if not involved in the burglary, the government participated in the actual search of the stolen documents.

> A private party acting as a government agent also may not expand upon a previously private search without running afoul of the Fourth Amendment. Although here the burglary may have been accomplished, that is, the boxes of documents had been stolen from Knoll's office before the government knew of the burglary, the search itself may not have been complete until Devany, upon Ernle's and ultimately AUSA Bruce's request, went through all the stolen files and listened to the tapes to find the material to be turned over to the FBI to be used against Knoll and Gleave. At some point in the ongoing search, Ernle and Devany may have been acting as agents of the government given that AUSA Bruce directed their actions and tacitly approved of whatever measures they took to produce information he wanted from the contents of the files.
>
> Unfortunately, the record respecting the government's role in this affair is incomplete. Hence, we must remand for further fact-finding since the testimony elicited at the suppression hearing sheds little light on the issue of the stage of the search at which Devany was effectively directed by government agents to continue looking for more information. In addition, further fact- finding to ascertain the state of the files during the development of the investigation against appellants is needed to determine if Knoll's expectation of privacy in the files continued after the burglary.

1. Gleave's Standing

Although remanded for further factual inquiry on the question of the nature of the government attorney's involvement in the search of the materials, Mr. Gleave's participation in that inquiry was pretermitted by the other ruling of the Circuit Court, that Gleave had no "standing" to challenge the search of materials in his files that were not also clearly protected by the attorney-client privilege.

In fact, for some inexplicable reason, the Second Circuit hinged the expectation of privacy upon the existence of a "confidential" relationship.

> More importantly, because Gleave sent the letters to an individual with whom he had no relationship of confidentiality, any legitimate expectation of privacy he may have had in them was abandoned.

Unfortunately, neither the district court nor the Circuit Court really analyzed whether there was anything privileged about the particular documents involved. It was simply assumed that because a letter had been sent to another party, the copy retained by the lawyer was in no way protected. But the essence of the ruling was that a client's expectation of privacy only extends to privileged "confidential" materials in the hands of the lawyer.

Applications by the government and both Gleave and Knoll for rehearing by the Second Circuit were denied.

Point I
A client must have standing to challenge the search of the client's papers held by a law office

Although claiming to recognize "in general" that a citizen retains the expectation of privacy in papers left with a lawyer, the Circuit Court actually wrote a different, unconstitutionally narrow rule.

Confusing the notion of confidentiality with that of "expectation of privacy," the panel reached the unprecedented determination that the client only has standing to challenge the *seizure* of materials protected by the attorney client privilege.

Thus, the panel concluded that, since the original of one document had apparently been sent to a third party, there is no possible expectation of privacy in the retained copy.

> But when one party relinquishes control of a letter by sending it to a third party, the reasonableness of the privacy expectation is undermined.

Of course, if the government in this case had originally obtained the letter from the apparent addressee, this reasoning would make sense. But there is no general requirement in the Fourth Amendment, in addition to having a reasonable expectation that the government would not intrude upon a certain place, without a warrant, that the citizen never have exposed the individual property or information to the view of other persons.

In other words, it has never been the case that only *private* personal effects are free from unreasonable searches

and seizures. If a person has a reasonable expectation of privacy in a certain premises, that expectation is not differentiated by whether particular personal effects therein have ever been or will ever be exposed to public view. Notably, in the "general" case cited by the Second Circuit, *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877, 82 A.L.R. 775 (1932). Most of what was seized was business records, invoices, etc. prepared by or sent to other persons!

The additional fallacy embodied in the Circuit Court ruling is the argument that once a document is conveyed to another, the communication of that document, or a copy of it or the information it contains to an attorney is not protected by the attorney client privilege. Were that not the case, the attorney whose client had signed a confession to the police would be free to publicize the fact that the client similarly confessed to the attorney.

From the general proposition that a citizen has a reasonable expectation of privacy in papers left with a lawyer or created or assembled by a lawyer in the course of providing legal services, it follows that the papers left with a lawyer ought to be as secure from governmental intrusion as papers or other property left at one's own home or anywhere where the citizen has an expectations of privacy. It has not been a feature of Fourth Amendment jurisprudence, nor is it an arguable tenet of the Fourth Amendment, that the expectation of privacy that one has in his or her home, for example, is diminished because the *particular paper or object* does not occupy some additional role as "private" or "confidential."

Rejected in this analysis is Gleave's expectation of privacy in the *premises searched*, his lawyer's office, squarely

conflicting with the Ninth Circuit decision in *Demassa v. Nunez*, 770 F.2d 1505 (9th Cir. 1985).

Although the standard for determining whether one has "standing" to challenge a search has changed, it has always been the case that, once it is determined that the citizen has a reasonable expectation of privacy in the place exposed to governmental intrusion, there is then no differentiation between the objects in the place with respect to how "private" each object is considered to be.

Indeed, much of Fourth Amendment law has been written concerning the need for a warrant to search in a private place, like a house, a container, or ones pockets for papers and object which were at one time exposed to the scrutiny of others, from Mrs. Mapp's magazines to Mr. Class' VIN number or the serial number on Mr. Hicks' Bang & Olafsen turntable.[3] For objects within an area where one reasonably expects privacy, the there is no "parsing" of the objects to determine whether they might individually be more or less "private" than the space in which they are contained.

Illogically, and without precedent, however, the Second Circuit has stated another rule. Its decision does not explain why, but it concludes that a person who entrusts papers or legal matters to a lawyer should have less an expectation of privacy in those papers than, for example, an overnight guest might have in documents left in the host's home. See *Minnesota v. Olsen*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d. 85 (1990).

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[3] *Mapp v. Ohio*, 367 U.S. 643 (1961); *New York v. Class*, 475 U.S. 106 (1986); *Arizona v. Hicks*, 480 U.S. 321(1987).

The recognized obligation of the lawyer to preserve the confidences and secrets of the client *supplements* rather than circumscribes the clients expectation of privacy. The reasonable expectation of society is that papers of any sort, whether private diaries, tax work papers, memos, or newspaper clippings, which are entrusted to the lawyer or collected by the lawyer, will be free from intrusion by those not part of the law office, and certainly free from unwarranted intrusion by the government. This expectation is basic, and it is enforced by the professional obligation of the lawyer to keep *all* papers of a client from the scrutiny of others. The lawyer is certainly not free to expose to the public correspondence and documents merely because they were sent to third parties, either by the client or the lawyer.

Thus, the reasonable expectations of privacy of a citizen with respect to the files of a client maintained by a lawyer extends to all the documents and things kept by the lawyer. This expectation of privacy is certainly no less than the expectation that *all* the things in one's house are, by virtue of their location, free form unwarranted inspection. Indeed it must be substantially greater than the usual protection of privacy in places of business. Cf. *United States v. Lefkowitz,* 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877, 82 A.L.R. 775 (1932); *Go-Bart Co. v. United States*, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374.

What the *confidentiality* of the relationship adds is the protection from even judicially-compelled disclosure of the confidences and secrets of the client, which also could include matters that were once exposed to the scrutiny of others, but which have been disclosed to the lawyer in confidence. This additional protection is enforced not only by the ethical

obligation of the lawyer to preserve the confidences and secrets of the lawyer, See Code of Professional Responsibility DR-4-101, but the rules of evidence and common law rules of privilege. The Fourth Amendment also would not recognize as "reasonable" a search of a lawyer's files for confidentially communicated information even if there was "probable cause".

It is therefore preposterous to suggest that a citizen's mere *standing* to challenge an unwarranted search of his or her attorney's files hinges not upon whether he or she had a reasonable expectation of privacy in the files maintained by the attorney, which ought to be taken for granted, but on whether the individual materials seized were immune from search altogether because privileged.

It is a dangerous precedent to suggest to police or, worse in this case, Strike Force attorneys, that a citizen's standing does not extend to all the documents held by a lawyer. The ruling of the Second Circuit would allow government attorneys, or burglars they engage for the purpose, to forcibly enter any law office to search through any legal file for evidence of criminality, or for any reason, and take anything they discussed, only at the risk of having to return materials later determined to be "confidential." At that point, however, nothing could repair the damage to the confidentiality of these materials, nor to the attorney-client relationship, in *specific* and in general.

The result in this case is as difficult to administer as it is shocking to the sensibilities.

Indeed, the chief argument of the government in this case is that the relevant papers seized actually "belonged" to the lawyer, not the client, even though it was the putative

involvement of Gleave in the matters upon which his liability hinged. How nice for the government to draw such fine distinctions in a case where, if there is a Fourth Amendment violation it is because a Strike Force attorney used a burglar to conduct an illegal search on behalf of the government and then knowingly plundered these stolen files.

But, this "property" argument was squarely rejected in *Demassa*

> The government then claims, without citation, that these appellants had no possessory or ownership interest in their files. Aside from the doubtful validity of this proposition (see *Kallen v. Delug*, 157 Cal.App.3d 940, 951, 203 Cal.Rptr. 879, 885 (1984) (under California law, the client's legal files belong to the client and not to the attorney); Model Rules of Professional Conduct Rule 1.6 (the client controls the release of information from his files), it is clear that neither ownership nor possession is a necessary or sufficient determinant of the legitimacy of one's expectation of privacy. See *Rawlings v. Kentucky*, 448 U.S. 98, 105-06, 100 S.Ct. 2556, 2561-62, 65 L.Ed.2d 633 (1980); *United States v. Salvucci*, 448 U.S. 83, 91, 100 S.Ct. 2547, 2552, 65 L.Ed.2d 619 (1980).

Neither the government not the court below addressed the points raised by the Ninth Circuit. It is also the law in New York that the client's files are the property of the client.

How would the government searcher distinguish those items that are "confidential" from those that are not? After the damage is done in a search, this doctrine would force upon the courts the task of distinguishing "confidential" communications from those that are not. Because in every

case this would involve invasion of the attorney-client relationship, and probable disqualification of he lawyer, it would be worse than trying to decide what is a "trespass," or who is an "invitee," or what is a "worthy container". Yet this Court has realized that the contours of the right to privacy ought not be worked out on such semantic battlegrounds.

The fact of the matter is that a wide array of materials may be collected by an individual to deliver to a lawyer in a matter—news clippings, photographs, articles, letters, notes, and objects of any variety—or collected by the lawyer. Many of these things in themselves may not be "confidential" or "privileged" because they may have once been in the public domain or planned to be made public some day. But the collection may create a unique constellation of information which for an infinite variety of reasons could represent something which is communicated in confidence or desired to be kept secret.

If government lawyers are free to use the contents of files stolen from a lawyer's office, except as to matters ultimately determined to be confidential[4] then what disincentive does this decision suggest to avoid a repeat in the future of what happened here? Indeed, this decision only encourages the government to do the same thing again, while it erodes any

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[4] Of course, the government is invited by the panel decision, to seize everything from a client's files, and then look for ways to suggest that the information had been communicated or shown to others at some time previous. Since it would be impossible for the government attorney, rummaging through his or her adversary's files, to determine what was disclosed in confidence or as a secret, there would be no way to restrict the search to non-privileged matters, even if the attorney was inclined to do so.

confidence of the public in the privacy of their attorney client relationship.

Essentially, the citizen's basic expectation of privacy in the materials maintained for the client by his or her lawyer is a reasonable one, and it must extend to all of this material, just as it extends to all the contents of one's home or any other place where there is also an expectation of privacy..

Beyond this a citizen should have *more*, not less, expectation of privacy in materials delivered to a lawyer for consideration. All the materials kept by the lawyer are reasonably expected to be *private*. The confidential materials are simply beyond the reach of the government or the court.

Because this decision conflicts with fundamental Fourth Amendment precepts, as well as the clear precedent in the Ninth Circuit, the Writ of Certiorari must issue.

Point II
Merely because a burglar has looked at the files stolen from the lawyer's office, ought not absolve the government attorney from the need for a warrant

What is of deep concern to Petitioner, and, we hope, to this Court, is that a United States Attorney is found to be free at all to look into files known to be stolen from another lawyer. How it is that the government attorney has any duty but to return the files to the lawyer, or at least get a warrant if there is cause, and then prosecute the thieves, is not discussed by the learned judges below.

However with only a passing reference to ancient "private search" cases, the panel of judges concluded that if the documents turned over to the government attorney by the burglars had "already been searched by private parties" a search warrant was not needed for the government attorney to read the papers too.

As to whether the government attorneys had searched beyond what the burglars had, or acquiesced in further searches by the burglars, this is an area to be explored on the current remand from the Second Circuit. Certainly the appearance that the government attorney approved of the burglary and offered no caution against continued illegal action

is a shocking signal that the "private search" doctrine is in need of a maintenance upgrade.

In applying the simple "private search" doctrine to the facts of this case, the Circuit Court's analysis is exceedingly thin. That Court's cited for its prime support the case of *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921), a case in which private corporate representatives took papers from the desk and safe used by Mr. McDowell and then delivered them to the department of justice. McDowell was not an attorney and there was little question but that the papers taken belonged to *him* and that only his rights were implicated.

Burdeau was predicated in part upon the supposition that the documents could have been *subpoenaed* from the "burglars" if they had not turned the documents over to the grand jury. But a law office is not like other businesses. The clients of the lawyer here could have intervened and moved to quash any subpoena for any papers that related to that client's matters. This should suggest a limit to the doctrine relied on by the court below.

It would be well to consider how much more poignant the opinion of Justices Brandeis and Holmes would be in the context of the present case:

> That the court would restore the papers to plaintiff if they were still in the thief's possession is not questioned. That it has power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But it is said that no provision of the Constitution requires their surrender and that the papers could have been subpoenaed. This may be true. Still I cannot

"standing" at once removes any deterrent to wholesale invasion of law office files: the client who has no standing to move to suppress does not even have a Civil Rights claim under 42 U.S.C. § 1983 or under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Thus, it is imperative that a Writ of Certiorari issue. This is at once because of the opposite rulings by the Second and Ninth Circuits on exactly the same point. But this is also because the decision of the Second Circuit on the standing issue alone is so obviously disruptive of centuries of expectations concerning the privacy of matters entrusted to members of the legal profession. This not only speaks to the gravity of the conflict between these two leading Circuits, but also to the fact that the Court below has departed so far from the usual course of judicial proceedings that this Court's supervisory powers should be exercised.

Respectfully submitted,
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August 9, 1994

APPENDIX

16 F.3d 1313, 1994 WL 44128 (2nd Cir.1994)

UNITED STATES of America, Appellee,

v.

David R. KNOLL and Ted W. Gleave,

Defendants-Appellants.

Nos. 1737, 1738,

Dockets 92-1580, 92-1586.

United States Court of Appeals,

Second Circuit.

Argued June 17, 1993.

Decided Feb. 14, 1994.

Former bankruptcy debtor and his attorney were convicted of bankruptcy fraud, and of aiding and abetting in allegedly making false statements to probation service, by the United States District Court for the Western District of New York, William M. Skretny, J., and they appealed. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) statute of limitations on prosecution of defendants for making false declaration in bankruptcy proceeding was not tolled, pursuant to statute extending the beginning of limitations period for crimes involving the concealment of debtor's assets; (2) case would be remanded for determination as to whether government agent became involved in search of attorney's office before search had accomplished its purpose; and (3) prosecutor did not improperly comment on defendant's failure to testify.

Affirmed in part, reversed in part and remanded.

Lawrence Vilardo, Buffalo, New York (Connors & Vilardo, Buffalo, New York, of counsel), for Defendant-Appellant David R. Knoll.

Philip Halpern, State University of New York, Buffalo, New York, for Defendant-Appellant Ted W. Gleave.

Denise E. O'Donnell, Assistant United States Attorney for the Western District of New York, Buffalo, New York (Dennis C.

Vacco, United States Attorney for the Western District of New York, Buffalo, New York, of counsel), for Appellee.

Vincent L. Briccetti, filed a brief on behalf of Amicus Curiae New York State Association of Criminal Defense Lawyers, White Plains, New York.

Before: CARDAMONE and MAHONEY, Circuit Judges, and CEDARBAUM, District Judge.*

CARDAMONE, Circuit Judge:

David R. Knoll and Ted W. Gleave appeal from judgments of conviction entered on September 28, 1992 in the United States District Court for the Western District of New York (Skretny, J.). A jury found Gleave guilty on two counts of bankruptcy fraud in violation of 18 U.S.C. §§ 152 and 2, and found Knoll guilty on one count of violating 18 U.S.C. §§ 152 and 2, for assisting Gleave, and one count of violating 18 U.S.C. §§ 1001 and 2, for aiding Gleave in allegedly making false statements to the probation service. The jury acquitted Gleave and Knoll on 42 other charges that were brought against them in a lengthy indictment, and Gleave was acquitted on one other charge brought solely against him. On September 25, 1992 appellants were each sentenced to two concurrent 27-month terms of imprisonment. All but three months of each appellant's sentence was suspended and the remainder was to be served on probation. In addition, Gleave was fined $5,000 and his term of imprisonment was to be served in a halfway house.

This appeal requires us to examine whether a search and seizure of a client's papers taken from his lawyer's office may violate the Fourth Amendment to the United States Constitution. That amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

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* Honorable Miriam Goldman Cedarbaum, United States District Court for the Southern District of New York, sitting by designation.

searches and seizures, shall not be violated...." U.S. Const. amend. IV. The Supreme Court teaches that "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). One of the principal questions raised is whether appellants' Fourth Amendment rights were violated by an unlawful intrusion.

BACKGROUND

A. The Cayman Islands Accounts

The parties to this appeal cast the relevant factual background in vastly different lights. We set forth only those facts pertinent to the issues presented. Appellants tell us that defendant Knoll, an attorney, went to the British-owned Cayman Islands, found in the Caribbean, south of Cuba and east of Mexico, in 1981 to establish a relationship with Barclays Bank. Knoll had hoped to open an account for an overseas company, Atlantis International, Ltd., and to use it to become involved in international trade. But due to prior financial problems he could not obtain a reference letter that Barclays required from a United States bank. Knoll thus sought out Ted Gleave, a friend and former client, to have him establish accounts with Barclays.

The government portrays the Cayman Islands banking connection differently. It says Gleave was the person who initiated overseas banking relationships. It suggests he did so to hide profits allegedly reaped from the sale of gasoline stolen from Ashland Oil, which sought treble damages in a civil RICO suit against him, and that Knoll was the lawyer that represented Gleave in the suit.

There is no disagreement that in February 1982 Gleave and Knoll went together to the Cayman Islands and there opened two bank accounts: a personal account in Gleave's name with an opening balance of $9,000 and a corporate account in the name of the soon-to-be-formed Atlantis International. They allegedly instructed Barclays that Gleave's personal account was to be closed

as soon as Atlantis was formed. Atlantis International was incorporated on March 4, 1982, but for some reason Gleave's private account was never closed. Gleave asserts that though he was the president of the corporation, it was a nominal title and he resigned the position before his August 1982 filing for individual bankruptcy. The government points out, to the contrary, that in a September 1984 power of attorney issued in connection with the Atlantis International account Gleave was listed as the "principal" of Atlantis.

Knoll deposited roughly $600,000 in the Atlantis account with Barclays, ostensibly without Gleave's knowledge. Appellants claim the money did not belong to Gleave and was not fraudulently procured. According to them this large sum was given to Knoll by one Anthony Korobellis. Although Gleave was the official signatory on the corporate Atlantis International checking account, the money in the account was allegedly managed solely by Knoll, who also managed all transactions in the personal account that remained in Gleave's name. Thus, appellants insist Knoll fully controlled Atlantis International and its Cayman Islands accounts.

B. Gleave's Bankruptcy Petition

Meanwhile, Gleave was a party to a divorce proceeding in Indiana. Knoll, acting as Gleave's attorney, recommended that Gleave file Chapter 11 bankruptcy to protect himself from the possibility that his wife would be awarded his assets thereby foreclosing his ability to satisfy his many creditors. Taking this advice, Gleave filed for bankruptcy on August 2, 1982. Knoll prepared and Gleave signed a "Statement of Financial Affairs" that was filed in the bankruptcy court. Question 1.d. of the Statement asked where and under what names Gleave had conducted business during the last six years. In his response Gleave did not list his relationship with Atlantis International. Question 7.a. then asked what bank accounts he had maintained alone or with others in the last two years; Gleave did not mention either his $9,000 personal account or the Atlantis corporate account at Barclays Bank.

Count three of the indictment subsequently charged Gleave

with concealing property in a bankruptcy proceeding in violation of 18 U.S.C. § 152. In finding Gleave guilty on that count, the jury found his Cayman Islands personal account should have been disclosed on the bankruptcy petition. Count four of the indictment charged Gleave with making a false declaration in a bankruptcy proceeding in violation of 18 U.S.C. §§ 152 and 2; it also charged Knoll with aiding and abetting Gleave to that end, in violation of 18 U.S.C. §§ 152 and 2. The jury found under count four that Gleave should have disclosed that he was "carrying on business" in the name of Atlantis International and that Knoll assisted him in the nondisclosure.

C. Gleave's Financial Statement

As an additional matter related to the current convictions, in June 1987 the U.S. Department of Justice sought to collect an outstanding $6,000 criminal fine imposed on Gleave in the Ashland Oil case. In response to a financial statement questionnaire dated June 2, 1987, Gleave answered "No" to questions asking whether in the last two years he had a savings account or a checking account. The jury convicted Knoll on count eight for aiding and abetting Gleave's false answer to the question regarding a savings account.

Appellants maintain the jury's verdict raises a question of consistency because Gleave himself was acquitted on count eight. They also stress that the Barclays account was a checking account, not relevant to the question concerning a possible savings account. The government explains this by pointing to Knoll's intrusive role in Gleave's affairs and the extent of Gleave's reliance on Knoll to complete the financial statement. The government notes that the signature card on the personal account at Barclays listed the account as a "Personal Current Savings/Deposit Account" and contends that the jury properly considered its status.

D. The Burglary of Knoll's Law Office

We come now to the heart of this case: the burglary of attorney Knoll's law office. The government concedes that they first began investigating Knoll and Gleave after obtaining documents stolen from Knoll's law office on the last weekend of June 1986.

The burglary of Knoll's law office, planned by one Timothy Ernle while incarcerated in a federal prison on bank robbery charges, was instigated for the purpose of locating incriminating evidence to be used against Knoll, which Ernle could exchange for favorable treatment on the robbery charges he faced. Ernle solicited Albert Hintenberger to break into Knoll's office and steal material. After the break-in was accomplished, Ernle contacted Assistant United States Attorney (AUSA) Anthony Bruce and a delivery of documents and tapes stolen from Knoll's law office was made to AUSA Bruce by Patricia Devany, Ernle's girlfriend.

Conflicting evidence was presented as to whether Ernle had contacted FBI agents prior to the burglary. The evidence showing earlier contact was discredited by the trial court, which found the government had no prior knowledge of the burglary. AUSA Bruce conceded however that after each of the first two deliveries of documents and tapes by Devany, he told Ernle he was disappointed with the material. As a result, Devany under instructions given her by Ernle brought more material to Bruce. AUSA Bruce and FBI agents eventually discovered two letters in Gleave's files, which had been maintained in Knoll's law office, addressed to Barclays Bank in the Cayman Islands. It was through these letters that Barclays' records were obtained by the Department of Justice. The instant prosecution ultimately ensued.

E. The Case

On February 22, 1990 Gleave and Knoll were indicted on 46 counts of conspiracy, bankruptcy fraud, money laundering, interstate transportation of monies obtained by fraud, and making false statements to a department of the United States. The defendants moved to have the documents that were stolen from Knoll's law office suppressed, primarily on the grounds that they were seized in violation of their Fourth Amendment rights. They also moved to dismiss several counts of the indictment, including count four, on the grounds that the counts were barred by the statute of limitations. Judge Skretny denied defendants' motions in a decision reported at United States v. Gleave, 786 F.Supp. 258 (W.D.N.Y.1992). After

three months of trial, which had commenced on December 3, 1991, Gleave was convicted on counts three and four, and Knoll was convicted on counts four and eight. This appeal followed.

DISCUSSION

I Statute of Limitations

We discuss first appellants' common count four convictions for making a false declaration in a bankruptcy proceeding. Their convictions on this count must be vacated because the statute of limitations expired with respect to the charges contained in count four before the indictment was brought against them. As an initial matter, the government's assertion that appellants waived this claim by failing to raise it is unpersuasive. Knoll's pretrial motion to dismiss clearly stated, "Counts 4 and 5 charging that alleged false statements made in 1982 and filed with the U.S. Bankruptcy Court in Buffalo are totally barred by the 5 year statute of limitations under 18 U.S.C. [s] 3282." An affidavit accompanying the motion spelled out this claim further, and Gleave joined in Knoll's motions. This claim was properly before the district court.

The statute of limitations argument hinges on the fact that the false statements alleged in count four were made in the financial statement signed by Gleave on July 28, 1982. The indictment was not returned against Gleave and Knoll until February 22, 1990, seven and one-half years after the offense. The statute of limitations for federal crimes is generally set at five years unless otherwise explicitly provided. See 18 U.S.C. § 3282 (1988). Section 3282 states: "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense ... unless the indictment is found or the information is instituted within five years ... after such offense shall have been committed."

The trial court ruled the statute of limitations bar with respect to count four was overcome by 18 U.S.C. § 3284 (1988). See Gleave, 786 F.Supp. at 266. Section 3284 extends the beginning of the limitations period for crimes involving the concealment of a debtor's assets. It provides: "The concealment of assets of a debtor ... shall be deemed to be a continuing offense until

the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge." 18 U.S.C. § 3284. Reading that statute literally compels the conclusion that only the concealment of assets--not the making of a false statement in a bankruptcy proceeding--is subject to the extended limitations period of 18 U.S.C. § 3284.

Count four charged that Gleave, aided and abetted by Knoll, "did knowingly and fraudulently and for the purpose of concealing assets of a debtor, make a false declaration under penalty of perjury, in a proceeding under the bankruptcy laws of the United States" in violation of 18 U.S.C. ss 152 and 2. The count tracks the language of the third paragraph of 18 U.S.C. § 152, which criminalizes knowing and fraudulent false statements made during the course of a bankruptcy proceeding. A separate and distinct statutory provision, the first paragraph of 18 U.S.C. § 152, criminalizes concealment of assets. Despite the fact that the purpose of making the false statement in Gleave's case may well have been to conceal assets, the substance of count four charged only the making of a false statement in connection with bankruptcy proceedings. It did not charge either appellant with the offense of concealment of assets. Hence, the extension of the limitations period provided for in § 3284 has no application to count four. In ruling to the contrary the district court erred.

This conclusion accords with the Supreme Court's instructions that criminal statutes of limitations are liberally construed in favor of repose, and that no offense should be construed as continuing a limitations period "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Toussie v. United States, 397 U.S. 112, 115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970); see also United States v. Watson, 599 F.2d 1149, 1154 (2d Cir.) (exceptions to general statute of limitations are construed strictly), on reh'g op. revised, 690 F.2d 15 (2d Cir.1979),

modified sub nom. United States v. Muse, 633 F.2d 1041 (2d Cir.1980) (en banc), cert. denied, 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed.2d 820 (1981).

The general five-year limitations period provided in 18 U.S.C. § 3282 applied to the false statements charged in count four. Since the document containing those statements was signed in 1982, the five-year limitations period was well past when Knoll and Gleave were indicted in 1990. Hence, appellants' convictions on count four must be reversed.

II Search of Client Files, Documents and Tapes Stolen from Knoll's Law Office

We next address Knoll's count eight conviction. That count charged him with aiding and abetting Gleave's false answer to the question of whether Gleave had a savings account in Gleave's 1987 Department of Justice financial statement. The information regarding the account was obtained from the files stolen from Knoll's law office. The search of those files presents a close and highly fact-bound question of Fourth Amendment law. Appellants assert the trial court erred in three respects: first, in finding the government did not participate in the burglary; second, in failing to consider appellants' argument that it was at the prosecutor's request that private parties searched through the stolen files after they had been removed from the firm; and third, in finding that once the documents were turned over to the government, no unreasonable search occurred when agents read the documents. There is no basis in the record before us to conclude that the trial court's findings on either the first or third point raised were clearly erroneous.

Conflicting evidence was presented to the district court on the first point, as to when the government had contact with Ernle. We decline to rehash the district court's findings as to credibility or to second-guess its conclusion that an after-the-fact FBI memo--which dates a discussion between Ernle and an FBI agent concerning Knoll as having occurred before the burglary--contained an error that was satisfactorily explained. See Gleave, 786 F.Supp. at 288. With respect to the third point, the district court properly

found the documents turned over to AUSA Bruce had already been searched by private parties and that a search warrant therefore was not required to read them. See id. at 291. There was thus no Fourth Amendment violation requiring suppression of the documents and papers taken from Knoll's office on that basis.

It is the second point, which concerns the period between the burglary and the time the stolen documents and tapes were searched by the private parties, that raises a number of troublesome questions and gives us pause. The potential error on this issue derives from what was not addressed, rather than from what was considered. The trial judge believed the Fourth Amendment had not been violated because he found the search "purely private," and applied the rule that evidence procured through a search by private individuals who are not acting as instruments or agents of the government may be used by the government. See id. at 285-86 (citing Burdeau v. McDowell, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921) and Coolidge v. New Hampshire, 403 U.S. 443, 487-88, 91 S.Ct. 2022, 2049, 29 L.Ed.2d 564 (1971)). Because the government was not involved in the burglary, we agree that this initial search was a private one under Burdeau and its progeny.

The district court nonetheless relied too heavily on cases where the government knew of or acquiesced in advance to a private search, see, e.g., United States v. Bennett, 709 F.2d 803, 805 (2d Cir.1983); United States v. Feffer, 831 F.2d 734, 739 (7th Cir.1987), and in doing so it failed to draw a distinction between the burglary and the search, which were, of course, two separate events. The scope of the search here included Devany's, and perhaps others', specific rummaging through boxes of files that had earlier been stolen from Knoll's law office.

The district court applied the wrong legal standard when it focused its attention only on whether the burglars acted as "agents of the government" during the initial search that took place in Knoll's law office. Gleave, 786 F.Supp. at 286. During the continuing discussions between Ernle and AUSA Bruce, the prosecutor said he was disappointed at the material turned over to

him and expressly told Ernle that he needed more detailed information. While the government emphasizes that the burglary had already been committed, the AUSA's requests tacitly suggested and condoned further searching, if necessary, through the stolen documents. The AUSA himself testified that he told Ernle he would have to "get me more information," and, "you've got to turn more over. If there's stuff out there, you've got to turn it over." Bruce made these statements while aware that there had been a burglary; he testified that Ernle made it "abundantly clear that there were a lot of documents that were available to him."

The district court observed that Devany, "after being instructed which of the materials to deliver to the government, ... examined the materials and listened to the tape recordings." Gleave, 786 F.Supp. at 291. While it appears all the files had already been taken from Knoll's office, it is not clear from the record that they had necessarily been opened. AUSA Bruce did not instruct Ernle to cease conducting any further searches, nor did he ask Ernle any questions with respect to the state of the files and whether they had been opened and examined.

Because the trial court did not address AUSA Bruce's comments, its discussion missed the crux of this issue. Although the applicable legal standard looks to whether the person searching and seizing was an agent of the government, see, e.g., United States v. Walther, 652 F.2d 788, 791 (9th Cir.1981), the standard does not take a solely ex ante perspective. The Supreme Court acknowledged in Lustig v. United States that "a search is a search by a federal official if he had a hand in it" and that "[s]o long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it." 338 U.S. 74, 78-79, 69 S.Ct. 1372, 1374, 93 L.Ed. 1819 (1949) (plurality opinion). Lustig makes clear that it is "immaterial" whether the government originated the idea for a search or joined it while it was in progress. Id. at 79, 69 S.Ct. at 1374. The government may become a party to a search through nothing more than tacit approval. See 1 Wayne R. LaFave, Search & Seizure § 1.8(b), at 180 (2d ed. 1987).

As can be seen, the critical issue is the point in time when the object of the search has been completed. If the object has been realized, the government cannot later become a party to it. By the same token, it may not expand the scope of an ongoing private search unless it has an independent right to do so. See Walter v. United States, 447 U.S. 649, 657, 100 S.Ct. 2395, 2402, 65 L.Ed.2d 410 (1980) (plurality opinion). A private party acting as a government agent also may not expand upon a previously private search without running afoul of the Fourth Amendment. Although here the burglary may have been accomplished, that is, the boxes of documents had been stolen from Knoll's office before the government knew of the burglary, the search itself may not have been complete until Devany, upon Ernle's and ultimately AUSA Bruce's request, went through all the stolen files and listened to the tapes to find the material to be turned over to the FBI to be used against Knoll and Gleave. At some point in the ongoing search, Ernle and Devany may have been acting as agents of the government given that AUSA Bruce directed their actions and tacitly approved of whatever measures they took to produce information he wanted from the contents of the files.

Unfortunately, the record respecting the government's role in this affair is incomplete. Hence, we must remand for further fact-finding since the testimony elicited at the suppression hearing sheds little light on the issue of the stage of the search at which Devany was effectively directed by government agents to continue looking for more information. In addition, further fact- finding to ascertain the state of the files during the development of the investigation against appellants is needed to determine if Knoll's expectation of privacy in the files continued after the burglary.

The Fourth Amendment only protects against a search that intrudes upon an individual's reasonable expectation of privacy. See Illinois v. Andreas, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983). If the files were closed and their contents not apparent from the exterior, the reasonable expectation of privacy continued so long as the files had not been searched before contact

with the government occurred. Otherwise, that expectation of privacy would have been frustrated and at an end. See Jacobsen, 466 U.S. at 117, 104 S.Ct. at 1658; see also United States v. Bonfiglio, 713 F.2d 932, 937 (2d Cir.1983) (clearly labeled cassette tape "had the practical effect of putting the contents of the tape in plain view and therefore reducing the expectation of privacy").

Under Fourth Amendment law a container need not be locked or fastened shut for there to be a legitimate expectation of privacy in its contents, though those facts are emphasized when they exist. See, e.g., Smith v. Ohio, 494 U.S. 541, 541-42, 110 S.Ct. 1288, 1289, 108 L.Ed.2d 464 (1990) (brown paper bag is a closed container); United States v. Donnes, 947 F.2d 1430, 1435-36 (10th Cir.1991) (reasonable expectation of privacy in opaque camera lens case). The Supreme Court has rejected a constitutional distinction between "worthy" and "unworthy" containers and has noted that "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." United States v. Ross, 456 U.S. 798, 822-23, 102 S.Ct. 2157, 2171-72, 72 L.Ed.2d 572 (1982). The often-stated requirement that a container need only be "closed" reflects the standard that for there to be a reasonable expectation of privacy, the contents of a container should not be apparent without opening. So long as the opaque file folders were closed or were in closed boxes, and did not reveal their contents, then a reasonable expectation of privacy continued even after they were stolen from Knoll's office.

Ultimately, we think the record has not adequately explored these issues, which we have highlighted to give the district court guidance on remand. We also note the heavy burden borne by the government in justifying a warrantless search. See United States v. Licata, 761 F.2d 537, 543 (9th Cir.1985); 4 Wayne R. LaFave, Search & Seizure § 11.2(b), at 218 (2d ed. 1987). If the search is found to be invalid, virtually all the key evidence introduced at trial against Knoll might, in retrospect, require suppression as "fruits of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417-18, 9 L.Ed.2d 441 (1963). Accordingly,

the case must be remanded for further fact-finding before Knoll's count eight conviction may be ruled upon.

III Gleave's Standing to Assert a Fourth Amendment Violation with Respect to

Documents and Tapes Stolen from Knoll

Whether Gleave's count three conviction may be reviewed depends on whether he has standing to object to the search of Knoll's office. A third party has standing to challenge the constitutionality of a search only when such individual has a "legitimate expectation of privacy" in the premises or items searched. See Rakas v. Illinois, 439 U.S. 128, 143, 148-49, 99 S.Ct. 421, 430, 433, 58 L.Ed.2d 387 (1978). The key documents here are two letters addressed to R.C. Sullivan, an officer of Barclays Bank, requesting wire transfers of monies held in the account of Atlantis International. One letter was unsigned and refers only to Knoll; the other was signed by both Knoll and Gleave as "principals" of Atlantis International. These two letters were discovered by the searchers among Knoll's files and turned over to AUSA Bruce who, through the Department of Justice, obtained Atlantis International's banking records in the Cayman Islands and the other evidence introduced at trial.

In general, we believe the protection of the Fourth Amendment extends to those papers that a person leaves with his or her lawyer. Cf. United States v. Lefkowitz, 285 U.S. 452, 464, 52 S.Ct. 420, 423, 76 L.Ed. 877 (1932) (protection of the Fourth Amendment extends to business offices). This is because the client has a subjective expectation that such papers will be kept private and such expectation is one society recognizes as reasonable. See Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979). But when one party relinquishes control of a letter by sending it to a third party, the reasonableness of the privacy expectation is undermined. See Ray v. United States Dep't of Justice, 658 F.2d 608, 611 (8th Cir.1981) (per curiam); cf. Jacobsen, 466 U.S. at 114, 104 S.Ct. at 1656 (party maintains expectation of privacy when letter is sealed and in transit).

Here, as an initial matter, the letters are not protected by the attorney-client privilege because their contents relate purely to business transactions. See United States v. Rosenstein, 474 F.2d 705, 714 (2d Cir.1973). More importantly, because Gleave sent the letters to an individual with whom he had no relationship of confidentiality, any legitimate expectation of privacy he may have had in them was abandoned. See United States v. Miller, 425 U.S. 435, 442, 96 S.Ct. 1619, 1623, 48 L.Ed.2d 71 (1976) (" '[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection.' ") (quoting Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967)). Without an expectation of privacy, Gleave lacks standing to assert a Fourth Amendment violation. See Rakas, 439 U.S. at 148-49, 99 S.Ct. 433. Absent a showing of such a violation, there is no poisonous tree and thus no fruit requiring suppression. See Wong Sun, 371 U.S. at 485, 83 S.Ct. at 416. Accordingly, Gleave's count three conviction may not successfully be challenged on Fourth Amendment grounds.

IV Other Claims Regarding the Count Three and Eight Convictions

Gleave and Knoll raise a number of other claims of error concerning their respective count three and eight convictions. Although none of them has merit, we write to dispose of them now in the interests of judicial economy.

A. Sufficiency of the Evidence

Viewing the evidence in the light most favorable to the prosecution, see Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), adequate proof was introduced at trial to support the count eight and count three convictions. Such evidence undoubtedly supported Gleave's count three conviction. It charged him with concealing property in a bankruptcy proceeding in violation of 18 U.S.C. § 152. The trial proof showed he opened and continued to use the account at Barclays in his own name. Circumstantial evidence demonstrated some or all of the money in the account belonged to him. Ample proof existed therefore to

overcome appellants' arguments that there was an insufficient connection between Gleave and the funds in the account in Gleave's name to charge him with ownership. The jury accordingly was justified in finding that he had concealed assets from the bankruptcy court in not listing this account on his bankruptcy schedules.

Count eight concerned the financial statement Knoll prepared and Gleave submitted to the Department of Justice. The jury convicted Knoll on count eight for aiding and abetting Gleave's false answer to a question on a Department of Justice financial statement asking whether he had a savings account in the last two years. The name of the account--listed on a Barclays card as a "Personal Current Savings/Deposit Account"--furnished sufficient proof for the jury to find the Cayman account was an unrevealed savings account. The jury had to decide whether the financial statement failed to disclose either a checking or a savings account and it decided that the account was best categorized as a savings account. No good reason is advanced for overturning that jury finding.

Whether Knoll's conviction for aiding and abetting may stand when Gleave was acquitted on count eight is a somewhat closer question. Knoll argues that his conviction may not stand in light of United States v. Ruffin, 613 F.2d 408, 412 (2d Cir.1979) (defendant charged with aiding and abetting cannot be convicted if crime not committed). Knoll insists the indictment charged him only with aiding and abetting Gleave under 18 U.S.C. § 2(a), not with acting as a principal by causing the offense under 18 U.S.C. § 2(b). We are unable to adopt this proposition. Knoll was here charged not simply as an aider and abettor, but also as a principal. We cannot discern from the record on which role the jury based its conviction, though the government concedes that he could not be found liable were he charged solely as an aider and abettor. But no variance between the indictment and the proof occurred at trial because count eight of the indictment charged Knoll as both principal and aider and abettor, since that count referred only to 18 U.S.C. § 2, without differentiating between its two subsections.

We have held that an indictment charging aiding and abetting

may be proven by demonstrating that the aider and abettor was in fact a principal. See United States v. Oates, 560 F.2d 45, 55 n. 6 (2d Cir.1977). Other circuits have stated that all charges in an indictment implicitly carry an 18 U.S.C. § 2 charge, see United States v. Galiffa, 734 F.2d 306, 312 (7th Cir.1984), and courts have encountered no "difficulty sustaining convictions when the indictment did not specify whether the defendant was the aider and abettor or the principal," United States v. Bryan, 483 F.2d 88, 95 (3d Cir.1973). Hence, the proof at trial properly showed Knoll acted as a principal, and did not constitute a variance from the indictment.

Sufficient evidence surely existed for the jury to find Knoll guilty as a principal for causing Gleave's false financial statement. The proof reflected Gleave's reliance on Knoll and Knoll's role in preparing the financial statement. Since a person may be convicted as a principal for causing an innocent intermediary to violate the law, see United States v. Tannenbaum, 934 F.2d 8, 14 (2d Cir.1991), Knoll's count eight conviction as an aider and abettor was sufficiently supported.

B. Prosecutorial Comments

The prosecutor did not improperly comment on Gleave's failure to testify. The test governing whether a prosecutor's statements amount to an improper comment on the accused's silence in violation of the Fifth Amendment looks at the statements in context and examines whether they "naturally and necessarily" would be interpreted by the jury as a comment on the defendant's failure to testify. See United States v. Bubar, 567 F.2d 192, 199 (2d Cir.), cert. denied, 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 151 (1977). We agree with the government that the first remark–that Ted Gleave was "[t]he only person that knows how that $600,000 got into the Cayman Island bank account"--was a fair response to the defense's claim that the government could not show the origin of the $600,000. The prosecutor's other statement observed that Gleave was "unwilling to admit he owns" certain property. Since the comment referred to Gleave's unwillingness to

admit ownership prior to trial, viewed in context the remark is not a comment on Gleave's failure to testify at trial. In addition, appellants have not shown substantial prejudice as a result of the prosecutor's statements, see United States v. Modica, 663 F.2d 1173, 1181 (2d Cir.1981) (per curiam), cert. denied, 456 U.S. 989, 73 L.Ed.2d 1284 (1982), a particularly heavy burden inasmuch as the trial court gave a curative instruction as part of its charge.

C. Gleave's Prior Conviction

Gleave's prior conviction in the Ashland case was properly admitted since he acknowledged profiting by over $100,000 from the sale of stolen gasoline in that case. The conviction related to his possible motive for committing the crimes charged in the indictment. See Fed.R.Evid. 404(b). Judge Skretny did not abuse his discretion in admitting the evidence. See United States v. Gilan, 967 F.2d 776, 780 (2d Cir.1992) (clear abuse of discretion required to overturn 404(b) admissibility decisions).

D. Right to Counsel

Knoll, who represented himself at trial, claims that he was denied his Sixth Amendment right to counsel. We disagree. The trial judge advised Knoll on numerous instances of his right to counsel and the problems he might encounter by proceeding pro se. While Knoll at one point stated to the trial court that when he was testifying as a witness he might decide to have "somebody come in from time to time like a cameo role to ask me questions in areas where it doesn't fit with me asking and answering," this did not constitute a request for counsel. Knoll himself stated he was merely "telegraphing" his thoughts to the court. The trial court had no obligation to grant Knoll counsel sua sponte in a trial where attorney Knoll did not request it.

E. Speedy Trial

We also find the Speedy Trial Act was not violated. See 18 U.S.C. § 3161 (1988) (requiring the government to bring criminal defendants to trial within 70 days of their first appearance before a judicial office or the filing of an indictment, whichever is later). Excluding relevant time periods pursuant to § 3161(h), many of

which were excluded at appellants' requests, both appellants were brought to trial within 70 days.

CONCLUSION

Accordingly, appellants' count four convictions are reversed. With respect to Knoll's count eight conviction, we remand the case to the district court for it to conduct a hearing consistent with this opinion to resolve issues of fact relevant to the Fourth Amendment suppression issue. Gleave's count three conviction is affirmed. We have carefully considered the remaining arguments appellants raise and find them to be without merit.

Supreme Court, U.S.
FILED
SEP 23 1994
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94-280

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

TED GLEAVE

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This supplemental petition for a Writ of Certiorari is being submitted because petitioner's attorney, Mark Mahoney failed to address the issue herein, apparently for fear of retribution if petitioner was successful.

Although a criminal defendant is guaranteed the right to a speedy trial under the Sixth Amendment to the Constitution, that right for all practical purposes has become a legal myth.

Lawyers, instead of protecting that right, routinely ask for continuances to accommodate their business and social schedules and almost universally the continuance is improperly granted by the court as an "accommodation". Since the lawyer requested the continuance, the court recognizes that as a practical matter, the lawyer will never move to dismiss the indictment for a violation of 18 USC 3161.

Because of this quid pro quo between the lawyer, the prosecutor and the judge, more often than not a defendant's constitutional right to a speedy trial is abridged and goes unredressed because of the lawyer's reluctance to raise the issue.

Many lawyers, off the record, admit that if they were to prevail on

this issue they would never get another continuance which is vital to administering to as many clients as possible.

Although this issue was "weakly" raised on appeal to the Second Circuit, petitioner's counsel failed to address the issue on rehearing in spite of the fact the petitioner specifically requested counsel to do so. By all standards, the delay was egregious, (over 2 years and 7 months from indictment to trial) and the Second Circuit failed to even comment on the issue although in many cases in which the delay was far shorter they gave a detailed analysis of the disputed periods.

What is even more perplexing in this case is the Second Circuit appears to have turned aside earlier rulings involving "retroactive" continuances and also appears to be in disagreement with several other circuits on the issues raised herein.

Since this issue involves a constitutional right that is routinely abridged, that there is a division among the circuits and a favorable ruling would wipe out the petitioner's conviction, a Writ of Certiorari should issue.

BACKGROUND AND FACTS

The background and facts of this case are set forth in the petition submitted by petitioner's counsel, Mark Mahoney on the issue of standing to challenge the illegal search of his lawyer's office.

ARGUMENT

THE DEFENDANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL

The Second Circuit's decision that Gleave's constitutional right to a speedy trial under the Sixth Amendment and 18 USC 3161 was not violated appears to be based on a rejection of two earlier opinions of that circuit in United States v. Tunnessenn, 763 F.2d 74 (1985) and United States v. Simmons, 782 F.2d 232 (1992), the Ninth Circuit's decision in United States Perez-Reveles, 715 F.2d 1348 (1983) & United States V. Hoslett, 998 F. 2d 648 (1993), the Sixth Circuit's decisions in United States v. Moran, 998 F.2d 1369 (1993) and United States v. Crawford, 982 F. 2d 199 (1993) and the Fifth Circuit's decisions in United States v. Castle, 906 F.2d 134 (1990) and United States v. Blackwell, No. 92-5076, 1994 WL 2267.

Due to a lack of any discussion relative to the excludable periods of delay in its opinion on the speedy trial issue it is impossible to determine whether or not the Second Circuit in fact disagrees with

its earlier opinions in Tunnessenn and Simmons, supra, but it is obvious that the Second Circuit disagrees with the holdings of the Fifth, Sixth and Ninth Circuits on the issues involved herein. Those six issues are as follows:

1. Retroactive continuances prohibited under Tunnessenn, supra.

2. That defendant does not have the authority to waive the speedy trial provision since the right to a speedy trial belongs to both the defendant and society under Blackwell, supra.

3. That the continuances granted under (h) (1-8) were not supported by recognized legally sufficient reasons under Perez-Reveles, supra.

4. That periods of time allowed by the trial court for the preparation of pretrial motions was not excludable under Moran, supra.

5. That when a defendant is joined with a codefendant and no severance has been granted only a "reasonable" time is allowed under United States v. Vasquez 918 F. 2d 329 (2nd. Cir. 1990)

6. That the government is only allowed a maximum of 10 days to transport a defendant and or witness who is in custody under Castle, supra.

In ruling that Gleave was brought to trial in a timely manner, the Court, without any formal analysis of the relevant time periods, implied that the continuances granted under 18 USC 3161 (h) were proper and appeared to suggest that because many of the continuances were allegedly requested by appellants they waived any chal-

lenge to the propriety of those continuances.

This ruling is at odds with two earlier Second Circuit decisions in United States v. Tunnessenn, (retroactive continuances) and United States v. Simmons, supra (delay to process a pretrial motion must be reasonable) and decisions of the Fifth, Sixth and Ninth Circuits relative to the granting of continuances and the exclusion of certain time periods.

The delays in this case were inordinately long and uncalled for. From arraignment to commencement of trial, over 21 months elapsed. Additionally, although Congress clearly indicated that continuances should "rarely" be granted, they were "routinely" granted, over 20 in all. In the United States v. Giambrone, 920 F.2d 176 (2nd Cir. 1990), this Court admonished the prosecutors in the Western District of New York for their flagrant disregard for the speedy trial rights of criminal defendants. At page 182 the Court said:

> Finally, Judge Arcara found that as this Court had observed in United States v. Kiszewski, a cavalier attitude toward speedy trial rights was characteristic of the United States Attorney's Office in the Western District of New York. In Kiszewski, we found it "disquieting that so many of our recent Speedy Trial Act opinions are in cases coming from the Western District," and noted that there was a strong suggestion of a Pattern of neglect." 877 F. 2d at 215.

The violation of the defendant's speedy trial rights in this case was far more egregious than in Giambrone supra. First, the prosecutor totally ignored this circuit's ruling in Tunnessenn. Second, no "legally sufficient" reasons were articulated when continuances were granted. Third, the government obviously misunderstood the Supreme Court's decision in Henderson v. United States, 106 S. Ct. 1871 (1986). In that case, the Court ruled that under subsection (F), any period of delay caused by any pretrial motion need not be reasonable. This case is not controlled by subsection (F) but rather is governed by (h) (7) which in contrast to the holding in Henderson, supra, only permits a "reasonable" delay. The Court was very cognizant of that fact and pointed it out at page 1875 at [1] where the Court said.

> in 3161 (h) (7), Congress provided for exclusion of a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted,". Apart from this single instance, every other provision in 3161 (h) provides for exclusion of "any period of delay."

Because the defendants in this case were joined together and no severance had been granted, section (h) (7) is controlling. That section, often overlooked, only provides for a "reasonable" delay to

process a pretrial motion. Henderson, supra, does not apply. As the docket sheet clearly indicates, the processing of the pretrial motion to suppress the evidence obtained for the alleged illegal search of Knoll's law office took 364 days which was clearly "unreasonable" in light of this circuit's decision in Simmons, supra.

In that case, the court reiterated the parameters of what constituted a "reasonable" time to process a pretrial motion enunciated in an earlier decision of this circuit in United States v. Cobb, 697 F. 2d 38. At page 493, the Court said:

> After reviewing the district court's findings, we find that the district court did not process appellant's motions in a manner consistent with the dictates of the Act and conclude that at least three days of the 177 day period are not excludable under section 3161 (h) (1) (F). As appellant reminds us, the standard we set forth in Cobb is one of necessity, albeit reasonable necessity.....
>
> We are particularity troubled by the district court's approach to the submission of papers. There was evidently no briefing schedule; the parties were allowed to file papers at a leisurely pace, with gaps of almost three weeks between responses even on the second round of briefing.

The Court went on to point out that an 11 day delay in setting a

hearing date was unacceptable in light of the already protracted schedule. On page 494 the Court said:

> The same is true of the subsequent postponement until October 9. While a week's delay would obviously not ordinarily constitue a "long postponement" under Cobb, its effect was cumulative of earlier delays in an already protracted schedule.

In order to assist the Court in concluding that Gleave's speedy trial rights were violated, a detailed analysis is set forth below.

FEBRUARY 23, 1990 THROUGH APRIL 5, 1990

[42]

non-excludable days

The clock began to run the day after indictment on February and continued to run until the first pretrial action was filed on April 5, 1990. As the transcript of the status conference on March 5, 1990 clearly indicates, neither Gleave nor his attorney was present and no continuance was requested by Gleave to review discovery material or to prepare pretrial motions.

At a second status conference an March 20, 1990, Gleave's attorney merely advised the Court she was in the process of attaining copies of discovery material and that she would be in a position to advise the Court as to whether any discovery motions would be filed by March 23, 1990.

Since there is no transcript of that status conference in the record the only insight as to what occurred on that day is reflected in the fatally defective "speedy trial order" dated March 23, 1990, issued by the magistrate. A careful examination of that order clearly indicates that no continuance was granted nor did Gleave's attorney ask for a continuance. She merely advised the Court that she was in the process of obtaining copies of documents provided by the government and that she would be in a position to advise the Court whether any discovery motions would be filed by March 23, 1990. That order also clearly indicates Knoll was not present at that proceeding nor did he request a continuance.

Since the transcript of the status conference on March 5, 1990, clearly indicates that no continuance was asked for or granted, the magistrates "retroactive" speedy trial Order was fatally defective under United States v. Tunnessen. Additionally, the order was also defective since the magistrate failed to make the required finding under (B) (i-iv). See Perez-Reveles supra, and United States v. Brooks, 697 F.2d 517 (3rd. Cir. 1982). As a result, the 42 days between February 23, 1990 through April 5, 1990 when the first pretrial motions were filed were non-excludable.

The government incorrectly contends that the time during this period

was excludable since the defendants used this time to prepare and file pretrial motions.

Recently, both the Ninth and Sixth Circuits reversed convictions because the district court had improperly granted a continuance to prepare and file pre trial motions. In United States v. Hoslett, 998 F.2d 648 (9th Cir. 1993) the Court noted on page 656 that:

> The Report of the Senate Judiciary Committee is the only explicit Congressional discussion of a pretrial motions preparation exclusion and it provides us with substantial assistance in this case. The report constitutes clear evidence of a deliberate decision not to allow for the routine exclusion of pretrial motion preparation time from Speedy Trial Act calculations.

The Sixth Circuit in United States v. Moran, supra, also took note that statute does not provide for an exclusion to prepare pretrial motions. On page 1371 the Court said:

> The statute does not provide that a period allowed by the district court for the preparation of pretrial motions is to be excluded from the seventy-day computations.

MAY 15, 1990 THROUGH JULY 2, 1990

[48]

non excludable days

The pretrial discovery motion filed by Knoll was denied by the magistrate on May 7, 1990. An overlapping motion filed by Gleave for a bill of particulars was decided on May 14, 1990, at which time the clock again began to run and continued to run until July 2, 1990 when Knoll stopped the clock by filing a motion for a severance generating an additional 48 non-excludable day, bringing the total to 90 as of July 2, 1990.

On that same day, the defendants appeared before Judge Arcara and he set September 7, 1990 as the last day to file additional pretrial motions. Although Gleave's attorney "requested " as much time as we can have" to file pretrial motions Judge Arcara was in error by excluding an additional 60 some days to file pretrial motions.

As of the date of that status conference, July 2, 1990, over 4 months had elapsed since the defendants were arraigned. It suffices to say that in effect, they had already been granted a continuance in excess of four months to file pretrial motions and this 60 days (that neither defendant requested) allowed by the judge to file additional pre-motions was clearly non excludable.

SEPTEMBER 20, 1990 THROUGH NOVEMBER 1, 1990

[32]

non excusable days

Judge Arcara denied the severance motions filed by both Gleave and Knoll on September 20, 1990 at which time the clock again began to run. On September 12, 1990, the Court filed a "speedy trial order" indicating that a continuance was being granted from September 10, 1990 through October 15, 1990 pursuant to 3161 (h) (1)) (F) but the order failed to articulate any reason[s] for granting the continuance.

On October 2, 1990, the Court granted an additional continuance which excluded the time from September 26, 1990 through November 15, 1990 pursuant to 3161 (h) (1) (F). Again the order was bereft of any reason[s] that would justify the granting of that continuance. Since there is no transcript in the record of the pretrial conference referred to in that order, we can only speculate that the Court's calendar was congested and this was a way of alleviating the problem, which, of course, is a prohibited practice.

All the Circuits agree, when a continuance is granted, the judge must set forth his reasons either orally or in a written order. See Perez-Reveles, supra, United States v. Crawford, 982 F. 2d 199 (6th

Circuit 1993), United States v. Brooks, 697, F. 2d 517 (3rd. Cir 1982), United States. Since Judge Arcara's orders of September 12 and 26, 1990, are devoid of any reasons whatsoever that would justify the granting of those continuances, no motions were pending and the defendants had almost 7 months since arraignment to prepare pretrial motions. Accordingly, the time between September 20, 1990 and November 1, 1990 (32 days) must be considered non excludable, bringing

the total as of November 1, 1990, when Knoll filed a suppression motion, to 122 non excludable days.

NOVEMBER 1, 1990 THROUGH OCTOBER 29, 1991

[over 180]
non excludable days

Both Knoll and Gleave filed motion to suppress evidence and to dismiss the indictment on November 1, 1990.

On November 16, 1990, Judge Arcara filed an order transferring the case to Judge Skretny. Although no reasons for the transfer are set forth in the record, it appears the transfer was made to alleviate calender congestion.

The suppression was not completed until August 8, 1991 some 8 months later and it is important to note that during this 8 month period the hearings only consumed a total of 8 "court days".

During this period, the Court continued the hearings on several occasions without citing any legally sufficient reasons for doing so which generated at least 160 additional non excludable days bringing the total as of October 29, 1991 to 302 non excludable days when the Court finally ruled on the suppression motions.

On October 29, 1991, the Court scheduled trial to commence on November 5, 1991 and, subsequently, denied the defendant's motions on October 29, 1991 (41 days after being taken under advisement).

In light of the Second Circuit's decisions in Simmons and Cobb, supra, as to what constitutes a "reasonable" time to process a pretrial motion, clearly the 363 days to process a suppression motion that only required 8 full court days of hearings was not even close to being "reasonable."

OCTOBER 18, 1991 THROUGH OCTOBER 29, 1991

[11]

non excludable days

Although the government may argue the question of what constitutes

a "reasonable" time to process a pretrial motion, certain periods of time are definitely non excludable. As the docket sheets indicate, Judge Skretny took the motions under advisement on September 18, 1991, the day the government filed its responding papers.

Section (h) (1) (J) expressly provides:

> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the Court.

As the docket sheets clearly indicate, Judge Skretny took 41 days to decide the motion and as a result the 11 extra days are non excludable.

FEBRUARY 18, 1991 THROUGH MARCH 18, 1991

[29]

non excludable days

The excessive delay by the government in producing Daniel Nowak who was in state custody for the suppression hearing generated at least 29 non excludable days. Knoll had advised the government before the hearings started on January 24, 1991 that he wanted to call Daniel Nowak as a witness. The government was aware that Judge Skretny would have to issue a writ of habeas

corpus ad testificandum so that Nowak could be produced for the hearing. That writ was not issued until February 8, 1991. Nowak was in a state prison some 4 hours from Buffalo. The marshals picked him up on March 6, 1991 but while in transit Nowak apparently became unruly and the marshals took him to a state facility instead of bringing him to Buffalo. He remained in state custody for 10 days for unexplained reasons and was finally produced at the hearing on March 18, 1991 some 39 days after the writ was issued.

Section (h) (1) (H) provides:

> (H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed unreasonable.

Although the above referred section refers to the transportation of a defendant, it clearly sets the parameters for others involved in a criminal proceeding over which the government has control. Since Nowak was within 4 hours of Buffalo, there is absolutely no reason why the marshals could not have left in the morning and

brought him to Buffalo in the same day. This excessive delay is precisely what the Act was intended to prohibit.

Since the writ of habeas corpus was issued by Judge Skretny on February 8, 1991, at a maximum, the government had until February 18, 1991 to produce Nowak in Buffalo. The 29 additional days it took the government to produce Nowalk are, therefore, non excludable. See United States v. Castle, supra.

The government contends that the entire period from the filing of the suppression motion on November 1, 1990 through October 29, 1991, when the motion was finally decided, was excludable under Henderson vs. United States 106 S. Ct. 1871 (1986).

The Court's ruling in Henderson is very often misunderstood. The Court's ruling in that case was limited to single defendant cases. On page 1875 at [1] the Court pointed out:

> Moreover, subsection (F) does not require that a period of delay be "reasonable' to be excluded, although Congress clearly knew how to limit an exclusion: in 3161 (h) (7), Congress provided for exclusion of a reasonable period of delay when the defendant was joined for trial with a codefendant as to \ whom the time for trial had has not run and no motion for severance has been granted.

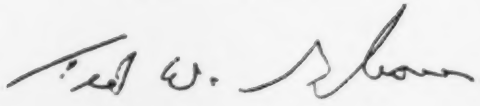
Since Gleave was joined for trial with Knoll and no severance was granted, 3161 (h) (7) was controlling, which provided for only a "reasonable" period of delay to process a pretrial motion.

In light of what the Second Circuit had concluded was a "reasonable" time to process a pretrial motion in Cobb and Simmons, clearly then the 8 months it took the resolve the suppression was not reasonable and, thus, the time was not excludable.

CONCLUSION

In sum, Gleaves was denied his right to a speedy trial guaranteed under the Sixth Amendment and there exists a conflict among the circuits on the issues raised herein which merits the granting of a Writ of Certiorari.

Respectfully submitted,



Ted Gleave

Supreme Court, U.S.
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No. 94-280

In the Supreme Court of the United States

OCTOBER TERM, 1994

TED W. GLEAVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner lacked standing to challenge the government's acquisition of certain letters taken from petitioner's lawyer's office during a burglary by a private party.

2. Whether the government's acquisition of the letters violated the Fourth Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 16 F.3d 1313. The opinion of the district court denying the motion to suppress is reported at 786 F. Supp. 258.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1994. A petition for rehearing was denied on June 3, 1994. The petition for a writ of certiorari was filed on August 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on two counts of bankruptcy fraud, in violation of 18 U.S.C. 152. He was sentenced to 27 months' imprisonment, all but three months of which was suspended. Petitioner was also fined $5,000. The court of appeals reversed petitioner's conviction on one of the counts and affirmed his conviction on the other.

1. In 1982, petitioner and David Knoll, an attorney, went together to Barclays Bank in the Cayman Islands. That trip resulted in the opening of two accounts at Barclays: a personal account in petitioner's name with an opening balance of $9,000 and a corporate account in the name of Atlantis International, Ltd. (Atlantis). Pet. App. A3. Knoll later deposited approximately $600,000 in the Atlantis account. *Id.* at A4. Petitioner was listed as the official signatory on that account. *Ibid.*

At trial, the parties disputed the question of who actually controlled the Cayman Islands accounts. The government introduced evidence that petitioner initiated and maintained the Cayman Islands accounts in order to hide his profits from the sale of gasoline stolen from Ashland Oil. Pet. App. A3. Petitioner and Knoll introduced evidence that Atlantis was Knoll's separate business, that the $600,000 Knoll deposited in that account was money he legitimately obtained from a third party, and that Knoll fully controlled and managed both Cayman Islands accounts. *Id.* at A4.

Several months after the trip to the Cayman Islands, petitioner filed for bankruptcy. In the bankruptcy proceeding, petitioner failed to disclose that he maintained a personal account at Barclays Bank. He also failed to disclose that he had conducted business in

the name of Atlantis. Knoll acted as petitioner's attorney during the bankruptcy proceeding. Pet. App. A4-A5.

Petitioner and Knoll were charged with 46 counts of conspiracy, bankruptcy fraud, money laundering, interstate transportation of money obtained by fraud, and making false declarations to a department of the United States. Pet. App. A6. The jury convicted petitioner on two counts of violating 18 U.S.C. 152: one for concealing his personal account at Barclays and the other for making a false declaration concerning his carrying on business in the name of Atlantis. Pet. App. A4-A5.

2. The government began investigating petitioner and Knoll after obtaining documents stolen from Knoll's law office. The burglary was planned by Timothy Ernle, a federal prison inmate. Ernle hoped to locate evidence against Knoll that he could exchange for favorable treatment on robbery charges he faced. After the burglary was carried out by an accomplice, Ernle sent a sample of the stolen documents to a federal prosecutor. Pet. App. A5-A6.

When the prosecutor advised Ernle that the information he had sent was unhelpful, Ernle sent additional sets of documents. One of those deliveries included copies of two letters addressed to Barclays requesting a transfer of money from the Atlantis account to Knoll's account at another bank. Pet. App. A6, A14; Gov't Suppression Hr'g Exhs. 1A, 1B. Both letters went out under Knoll's letterhead. Exhs. 1A, 1B. One of the letters bears the signatures of both petitioner and Knoll as principals of Atlantis. Pet. App. A14. The copy of the second letter is unsigned. *Ibid.* Information obtained as a result of those two letters led to the indictment of petitioner and Knoll. *Id.* at A6.

3. The district court denied a motion to suppress the letters. The court found that the search of Knoll's office and the seizure of the two letters had been effected by private individuals not acting as government agents. It therefore concluded that there was no Fourth Amendment violation. *United States* v. *Gleave*, 786 F. Supp. 258, 282-293 (W.D.N.Y 1992).

The district court also held that the two letters were not protected by the attorney-client privilege. *Gleave*, 786 F. Supp. at 291-293. The court reasoned that the letters did not involve petitioner's relationship with Knoll as a client, but arose out of their business dealings. *Id.* at 292. The district court also concluded that the letters fell outside the scope of the privilege because they were communications to a third party. *Id.* at 292 n.24.

4. The court of appeals reversed petitioner's conviction for failing to disclose that he had carried on business in the name of Atlantis, because it held that the statute of limitations had expired. The court affirmed petitioner's conviction for failing to disclose his personal Barclays account. Pet. App. A1-A19.

In affirming petitioner's conviction on the latter count, the court rejected petitioner's contention that the government's use of the two letters violated his rights under the Fourth Amendment. The court held that because petitioner did not have a reasonable expectation of privacy in the letters, he lacked standing to object to the government's acquisition of them. Pet. App. A14-A15. The court explained that while a client generally has an expectation of privacy in documents left with his lawyer, *id.* at A14, the letters here were not protected by the attorney-client privilege "because their contents relate purely to business transactions." *Id.* at A15. "More importantly," the court stated, "because [peti-

tioner] sent the letters to an individual with whom he had no relationship of confidentiality [*i.e.*, the officer of Barclays Bank], any legitimate expectation of privacy he may have had in them was abandoned." *Ibid.*

Although holding that petitioner lacked standing, the court considered the validity of the search in connection with the appeal of petitioner's co-defendant Knoll. The court held that the initial search of Knoll's office was a private one and therefore did not implicate the Fourth Amendment. Pet. App. A9-A10. The court remanded, however, for additional findings on whether the government had improperly expanded the scope of the original search by requesting more information from Ernle. *Id.* at A9-A14.

ARGUMENT

1. Petitioner contends (Pet. 11-18) that the court of appeals erred in holding that he lacked standing to challenge the government's acquisition of the letters stolen from his lawyer's office. That contention is without merit.

A party may challenge the constitutionality of a search only when he has a "legitimate expectation of privacy" in the premises or items searched. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978). The court of appeals concluded in this case that a client generally has a reasonable expectation of privacy in confidential documents protected by the attorney-client privilege. Pet. App. A14. The court correctly held, however, that petitioner did not have a reasonable expectation of privacy in the letters at issue here. *Id.* at A14-A15.

Petitioner did not give the letters to his lawyer to obtain legal advice. Cf. *Fisher* v. *United States*, 425 U.S. 391, 402-404 (1976). Rather, they were sent to the

Barclays Bank for a purely commercial purpose—to effect a transfer of money out of the Atlantis account. As the court of appeals held (Pet. App. A15), such purely commercial documents are not protected by the attorney-client privilege. *United States* v. *Davis*, 636 F.2d 1028, 1044 (5th Cir.), (attorney who acts as his client's business advisor or agent "is not acting in a legal capacity, and records of such transactions are not privileged") cert. denied, 454 U.S. 862 (1981); *United States* v. *Rosenstein*, 474 F.2d 705, 714-715 (2d Cir. 1973) (the attorney-client privilege is inapplicable to routine commercial matters when the attorney and client are engaged in business together).

Moreover, as the court below concluded (Pet. App. A14-A15), any expectation of privacy petitioner may have had was compromised once the letters were received by the bank. As this Court held in *United States* v. *Miller*, 425 U.S. 435, 442 (1976), a bank customer does not have a reasonable expectation of privacy in "information voluntarily conveyed to [a] bank[] and exposed to [its] employees in the ordinary course of business."

Petitioner contends (Pet. 12-13) that he had a legitimate expectation of privacy in the entire premises of his lawyer's office. According to petitioner, the situation here is analogous to one in which a person's home is searched. In that context, petitioner notes, a person may object to the seizure of any documents, not just those that contain confidential matters. Petitioner's analogy is unpersuasive. The burglary did not take place in petitioner's business premises; it took place in Knoll's law offices. Petitioner was not an owner, member, or employee of Knoll's law firm. Nor does he claim that he had a right of personal access to Knoll's offices. In those circumstances, petitioner did not have a reasonable

expectation of privacy in the entire premises of Knoll's law offices.

Petitioner contends (Pet. 12-13) that the decision in this case conflicts with the Ninth Circuit's decision in *DeMassa* v. *Nunez*, 770 F.2d 1505 (1985). Contrary to petitioner's contention, *DeMassa* did not hold that a client has a reasonable expectation of privacy in the entire premises of his lawyer's office. *Id.* at 1506-1507. Rather, it held that "the attorney-client privilege confers upon the client an expectation of privacy in his or her confidential communications with the attorney." *Id.* at 1506 (emphasis omitted). That holding is consistent with the court's decision here, which recognized that clients generally have a reasonable expectation of privacy in confidential documents protected by the attorney-client privilege, but determined that the particular documents at issue here did not fall within the scope of that privilege. Pet. App. A14-A15.

2. Petitioner next argues (Pet. 19-20.1) that the government's use of the letters violated the Fourth Amendment. Petitioner specifically contends that this Court should reconsider its decision in *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921), which holds that, because the Fourth Amendment is inapplicable to a search conducted by a private citizen not acting as a government agent, the government is free to use information uncovered in such a search. Since the court of appeals properly concluded that petitioner lacked standing to object to the government's acquisition of the letters, however, that issue is not properly presented here.

Moreover, while the court of appeals addressed the validity of the government's acquisition of the letters in connection with Knoll's appeal, it did not finally resolve that issue. Rather, the court remanded for further

findings on whether the private parties who burglarized Knoll's office were acting as government agents when they discovered the letters. Pet. App. A9-A14. Consideration of the validity of the government's use of the letters is therefore "not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967).

In any event, there is no reason for this Court to reconsider *Burdeau*. As the Court explained in *United States* v. *Jacobsen*, 466 U.S. 109, 113-115 (1984), the Fourth Amendment "proscrib[es] only governmental actions." It is "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *Ibid.* See also *Walter* v. *United States*, 447 U.S. 649, 656-657 (1980) (plurality opinion). Accordingly, when government authorities receive documents obtained through a private search and do not exceed the scope of that search, the Fourth Amendment is not implicated. *Jacobsen*, 466 U.S. at 115-118.

Petitioner contends that *Burdeau* should be narrowed to exclude the use of stolen documents protected by the attorney-client privilege. Pet. 20.1. But the rationale of *Burdeau*—that the Fourth Amendment is not implicated by private action—affords no basis for distinguishing between the private theft of documents protected by the attorney-client privilege and the private theft of all other documents. Even if such a distinction could be drawn, it would not assist petitioner since the letters at issue here were not protected by the attorney-client privilege.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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